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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Petitioner,
v.
CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
To the California Court of Appeal
Second Appellate Distr. Div. 6

BRIEF OF MATTEONI, O'LAUGHLIN & HECHTMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

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INTEREST OF THE *AMICI CURAE*[1]

Amici are attorneys practicing law in the state of California. The firm's emphasis is on eminent domain, inverse condemnation, and land use. The firm principal, Norman E. Matteoni, is the primary author of California's Continuing Education of the Bar publication, *Condemnation Practice in California,* published annually since 1973.

Amici represent clients who have meritorious regulatory takings claims. Moreover, *amici* are familiar with the litigation of inverse condemnation cases and the fact-intensive nature of this inquiry. Accordingly, *amici* bring a practical as well as a legal perspective to the systemic imbalances that preclude an injured party from presenting a meritorious claim, to protecting their federally protected property rights.

Amici write this brief because a grant of review and reversal in this case will eliminate the chilling effects produced by the failure of lower courts to

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the *amici*, made monitory contribution to the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in connection with the petition for certiorari, and they filed letters reflecting consent, with the clerk. Notice was provided to the respondent that *amice* would be filing this brief.

adhere to this Court's directives contained in *Penn Central*, and improper expansion and application of the ripeness doctrines to exclude meritorious claims.

ARGUMENT

1. Review Is Needed To Make Explicit That Fifth Amendment Regulatory Taking Claims Raise Serious Constitutional Issues That Are Predominately Factual Questions Requiring A Trial On the Merits.

As recently as 2005 this Court reiterated that the proper focus in a regulatory taking claim is upon the "severity of the burden that the government imposes upon private property rights." (*Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005).) The Court went on to specifically reject the "substantially advances" test of *Agins v. City of Tiburon* 477 U.S. 255 (1980) on the premise that such a test "tells us nothing about the actual burden imposed on property rights, or how the burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." (*Lingle*, 544 U.S. at 543.) Thus, the Court was explicit that the proper focus is on a challenged regulations effect on a private owner.

Unfortunately, many lower courts have the analysis reversed and focus on whether or not the purpose of the regulation is a reasonable legislative act without any regard to the impact on an individual owner. In the present case, the court below focused on the reasonableness of the Coastal Commission's decisions without any regard for the impact on the landowner, Charles Pratt Construction Co, Inc. ("Pratt"). This is at odds with takings jurisprudence since valid regulations enacted for reasonable or even beneficial public purposes still requires compensation if private property rights are violated. (*Lingle*, 544 U.S. at 543 [Owner of property subject to a regulation that serves a legitimate state interest may still suffer a taking.].)

If the focus of regulatory takings analysis is to evaluate the impact of a regulation on individual owners then the individual owners must be guaranteed an opportunity to have a trial on the merits. This Court's decisions have recognized that "regulatory takings jurisprudence is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central Transportation Company v. City of New York* 438 U.S. 104, 124 (1978) designed to allow 'careful examination and weighing of all the relevant circumstances.'" (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 535 U.S. 302, 322 (2002) quoting *Palazzolo v. Rhode Island*, 533 U.S., 606, 636, (O'CONNOR, J., concurring).) As

recently as 2005 the Court reiterated, that the *Penn Central* factors remain valid and that the Court has hereto been "unable to develop any set formula for evaluating regulatory taking claims." *Lingle v. Chevron*, 544 U.S. at 538-539.

Yet, too often lower courts have ignored the directive of *Penn Central* that regulatory takings are a factual question that can only be resolved after examining the relevant facts and circumstances. Despite this Court's admonitions lower courts still need explicit direction that regulatory takings claims are fact intensive inquiries raising serious constitutional issues which makes regulatory takings claims woefully inappropriate for summary adjudication.

In the instant case, the court below appointed itself the judge, jury, land use expert and apparently the appraiser to determine from the pleadings that 20% of the property remained potentially developable, so there was no taking as a matter of law. The court reached this conclusion despite the fact that Pratt's appraiser opined that the regulations could limit the allowable use of the 124 acre site to as little as 1120 sq. ft. (Judgment and Ruling of California Superior Court, Appendix B, page 22 of Petition for a Writ of Certiorari.) Such a cursory application of selective facts contained in the pleadings directly contradicts this Court's

admonitions to avoid set formulas and instead analyze the relevant facts. (*Palazzolo v. Rhode Island* 533 U.S. 606, 636. ["The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context to eschew set formulas and to apply a *ad hoc* factual inquiry."].)

The court below precluded Pratt from presenting evidence of the impacts of the Coastal Commission's actions. This outcome cannot be reconciled with the takings jurisprudence of this Court and certiorari should be granted so the Court can give guidance that, under *Penn Central*, regulatory takings require an analysis of the facts and that analysis requires a trial on the merits. A trial on merits would result in a judicial decision based on evidence presented by appraisers, planners and other experts. Not a decision based on the trial court making a cursory, "gut reaction" without reference to any testimony or factual development.

2. REVIEW IS NEEDED TO GIVE DIRECTION TO FEDERAL AND STATE COURTS THAT REGULATORY TAKING CLAIMS RAISE IMPORTANT CONSTITUTIONAL QUESTIONS THAT CANNOT BE EVADED BY INDISCRIMINATARILY APPLYING AND ENLARGING THE "RIPENESS" REQUIREMENT.

It is fairly evident reviewing the federal circuits that the ripeness requirement has become an "escape hatch" for those courts who do not believe that regulatory takings claims raise important constitutional questions. Numerous federal decisions have expressed disdain for regulatory or land use cases as reducing the court to a local zoning board. (*Spence v. Zimmerman 873* F.2d 256, 262 (11th Cir. 1989); *Littlefield v. City of Afton* 785 F.2d 596, 607 (8th Cir. 1986); see also Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases,* 10 Journal of Land Use and Environmental Law 91[1994].)

This bias against landowners and their regulatory taking claims has been summarized and repeated by the Ninth Circuit which explain that it was the job of the courts to make it difficult to open the federal courthouse court for relief from State and local land use decisions (*Hoenhne v. County of San Benito* 870 F.2d 529, 533 (9th Cir. 1989); *Dodd v.*

Hood River Cty. 136 F.3d 1219, 1230 (9th Cir. ,1998) [The Courts of Appeals were not created to be "the Grand Mufti of local zoning boards," *Hochne ,supra* at 532 , nor do they "sit as [ ] super zoning board[s] or [ ] zoning board[s] of appeals." *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir.1985).]

The impact of this express bias in federal decisions has resulted in a judicial inference that regulatory taking claims are less important than other constitutional challenges. (*Coniston Corp. v. Village of Hoffman Estates* 844 F.2d 461, 467 (7th Cir 1988)[allegations of Fifth and Fourteenth Amendment violations represent "garden variety zoning disputes dressed up in the trappings of Constitutional Law"]; Overstreet, *supra,* 10 Journal of Land Use and Environmental Law at 92.)

Unfortunately, the state courts have picked up on the federal judiciary's hostility to regulatory takings claims and are mimicking this hostility by either invoking or expanding federal ripeness requirements or creating expansive state ripeness requirements.[2]

In the present case, the Court is faced with application of the federal ripeness requirements as

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[2] (See Overstreet, *Id.* at 134 for discussion of ripeness holdings from Illinois, Michigan, New Hampshire, New York, Pennsylvania, Rhode Island, Virginia and Washington.)

the court below based its ripeness decision on *Toigo v. Town of Ross* 70 Cal. App.4th 309, 329 (1998). *Toigo* at page 325 cites to *Williamson Planning Comm'n v. Hamilton Bank* 473 US 172 (1985) for the basis of California's ripeness doctrine.

The practical reality of this judicial hostility to regulatory takings and the willingness of the courts to expand the ripeness doctrine beyond its logical boundaries has not been lost on governmental agencies. These agencies see the ripeness doctrine as a shield that insulates an agency from rarely, if ever, being held accountable for its actions. Thus, the ripeness doctrine has actually given government agencies an incentive to create a complicated procedural maze that effectively prevents a legitimate claim from ever ripening thereby limiting any liability for the Agency's conduct. Unfortunately, an owner in today's regulatory environment is likely to be bankrupted by the government review process before their constitutional claim can ever ripen.

It is true that this Court presumably has addressed this issue of unfair delay in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698,(1999) ["Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."] Unfortunately, like *Penn*

Central, lower courts including the lower court in the present case have routinely ignored this Court's direction and instead focus on the fact that there were 5 formal decisions and 19 site plans submitted in *Del Monte Dunes* to distinguish it. The courts fixate on the number of applications submitted and not on the fairness of the process which is the underpinning of this Court's takings jurisprudence. (*Penn Central*, 438 U.S. at 123-124 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, (1960)) ["We have recognized that this constitutional guarantee is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"].)

The ripeness requirement and its "more than one application" prong is being used indiscriminately by lower courts without any regard for fairness and justice. Certiorari is necessary to rein in this imbalance and require that courts review the approval process to insure that the land use procedures are not an unfair maze aimed at thwarting claims from ever ripening.

The present case is an apt example of a procedural maze and the devastating impact that mechanically applying the ripeness requirement has on an owner. Even though Pratt had spent almost a decade pursuing its project and in that process had

analyzed ten different alternatives (all of which were rejected by the Coastal Commission) the court below ruled Pratt was required to do more before its claim could ripen. This, despite the fact that the Coastal Commission expressly concluded that it could offer no suggestions on how to modify the project to make it acceptable and rejected it in its entirety.

The unfairness of the ripeness decision becomes even more apparent when one considers the thoroughness of the environmental review process that the project and its ten alternatives had already been subjected to. The notion that Pratt needs to submit a new proposal so that the court is able to determine the full extent of the regulation is comical in light of the extensive analysis and numerous alternatives that were considered and rejected. The court's belief that it would be unable to determine the full extent of the regulation without a further application does not withstand scrutiny.

California Environmental Quality Act (Public Resource Code Sections 21000-21177; ("CEQA")) is commonly referred to as CEQA and is a comprehensive, environmental review process. CEQA requires an environmental impact report ("EIR") for any project and requires that the EIR describe and analyze a project's significant environmental affects, mitigation measures, and alternatives.

An EIR is the primary means of achieving the policy goals that approving entities "take all action necessary to protect, rehabilitate and enhance the environmental quality of the state." (Cal. Pub. Res. Code Section 21001(a).) The statutory purposes of an EIR are to provide public agencies and the public with a detailed analysis of the affects that a project is likely to have; list measures that will minimize the significant impacts of a project; and identify alternatives to the proposed projects. (Cal. Pub. Res. Code Sections 21002, 21002.1(a), 21061.)

An EIR is a very costly undertaking for an owner and is a very extensive analysis that requires many items to be addressed including the following:

- A project description containing sufficient information about the project to allow a complete evaluation and review of the environmental impacts (14 Cal. Code Reg. Section 15124);

- A description of the existing environment in the vicinity of the project from both a local and regional perspective and the project's impact on any environmental resources (14 Cal. Code Reg. Section 15125(a), and 15125(c));

- A description of the project's significant environmental effects including direct, indirect and long-term effects as well as any possible

environmental impacts that were found to be insignificant (Cal. Pub. Res. Code Section 2100(b)(1); 14 Cal. Code Reg. Section 15126.2(a));

- A discussion and analysis of significant cumulative impacts considering the project in relation to existing and anticipated projects; (14 Cal. Code Reg. Section 15130(a)(b));

- A list identifying and describing feasible measures that can be implemented to reduce or avoid each potentially significant environmental effect of the project (Cal. Pub. Res. Code Section 21100(b)(3); 14 Cal. Code Reg. Section 15126.4(a)(1));

- A description of a reasonable range of alternatives to the project or to its location that could reduce or avoid the significant impacts of the proposed project. This analysis requires a comparative evaluation of each alternative. (Cal. Pub. Res. Code Section 21100(b)(4); 14 Cal. Code Reg. Section 15126.6(a)-(e));

- An examination of whether a project will lead to economic or population growth or encourage development or other activities that could affect the environment. (Cal. Pub. Res. Code Section 21100(b)(5));

- An explanation of all potentially significant impacts that cannot be mitigated and are therefore are unavoidable and the implications of these impacts and the reason the project is being proposed despite these effects. (Cal. Pub. Res. Code Section 21100(b)(2)(A); 14 Cal. Code Reg. Sections 15126(b) and 15126.2(b));

The EIR before to the Coastal Commission in support of Pratt's project was an extensive analytical and fact-filled report discussing no less than 10 alternatives. The very purpose of an EIR's discussions of alternative and mitigation measures is to identify ways to reduce or avoid significant environmental effect. (*Laurel Heights Improvement Association v. Regents of the University of California* 47 Cal.3d. 376, 403 (1988).) By law the alternatives discussed in an EIR should be ones that offers substantial environmental advantages over the proposed project. (*Citizens of Lolita Valley v. Board of Supervisors* 52 Cal.3d 553, 556 (1990).) Moreover, a lead agency may eliminate from consideration potential alternatives that are incapable of reducing environmental impacts. (*Mann v. Community Redevelopment Agency* 233 Cal.App.3d 1143 (1991).) Importantly, an EIR need not consider alternatives that are not feasible. (14 Cal. Code Reg. Section 15126.6(a).)

Despite all of these alternatives contained in the EIR the court below determined the record was insufficient to determine the scope of the regulation. This mechanical application of the "one additional application" rule is unfair considering the circumstances of this case.

Pratt finds itself trapped in a bureaucratic maze where the County of San Luis Obispo is the lead agency that undertook the analysis of the EIR and developed the alternatives in conjunction with Pratt. It was the County that ultimately decided which alternatives to accept and to certify the EIR after extensive review. Yet, despite complying with California law and working with the local land use authority the Coastal Commission stepped in on appeal and rejected the proposed plan as well as all of Pratt's alternatives.

Now the Coastal Commission wishes to hide behind the ripeness doctrine to preclude a judicial challenge. Inexplicably, the court held that Pratt must submit again to determine what type of project the Coastal Commission would eventually approve. The procedural reality is that the Coastal Commission was sitting as the final appeal board and there is no way that Pratt can resubmit a project to the Commission or seek a variance from the Commission. Thus, the court is requiring that Pratt do what there is no statutory authority for it to

accomplish–resubmit to the Coastal Commission. (California Public Resource Code Section 30603.) This is the very type of unfair process that *Del Monte Dunes* requires be rejected by the courts. But, instead Pratt is stuck in regulatory limbo with no avenue to vindicate its rights under the lower court's mechanical and illogical application of the ripeness rules.

It is unfair and improper for local and state government to set up a process that can effectively preclude a party's claim from ripening after ten years of extensive analysis merely by transferring the appeal authority to a different entity. This result just encourages additional layers of bureaucracy to insure that the ripeness requirements can never be met. Certiorari should be granted and the Court must definitively state that where local and state governments have created an approval process that is so convoluted and oppressive that it cannot be allowed to destroy fundamental constitutional rights.

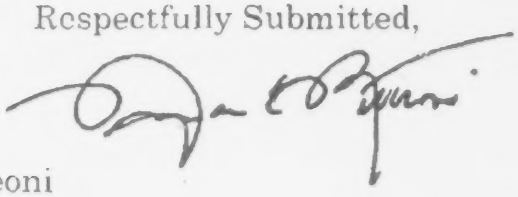
CONCLUSION

In a perfect world the planning and development process would be devoid of biases and every project would be entitled to a fair and equitable treatment. The reality is that bias exists and the ripeness doctrine has been improperly expanded and applied so that owners have very little protection

from overreaching by regulators. Regulators often ignore owner's rights shielded by the knowledge that the hurdles placed in front of each owner make any accountability highly unlikely.

Moreover, the current ripeness requirements are so misunderstood and have been so misapplied by the courts that potential litigants with valid constitutional claims cannot afford to risk meritorious litigation. This situation is exacerbated when the courts summarily adjudicate takings without adhering to the balancing of the individual facts and circumstances that a *Penn Central* analysis requires. The lack of consistent judicial treatment of regulatory takings claims is undercutting the constitutional guarantees afforded property owners and certiorari should be granted to address these problems.

Respectfully Submitted,



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